CC Docket #96-98

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of | ) | |
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| Request by ALTS for Clarification | ) | CCB/CPD 97-30 |
| of the Commission's Rules Regarding | ) | |
| Reciprocal Compensation for | ) | |
| Information Service Provider Traffic | ) | |

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**AMERITECH REPLY**

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# AMERITECH REPLY

## I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies (Ameritech) respectfully submit this Reply to Comments in the above-captioned proceeding. This proceeding raises the issue of whether a call through which an end user obtains access to an Internet service provider or other Information Service Provider (ISP) is local traffic to which the reciprocal compensation provisions of the 1996 Act apply. In its Comments, Ameritech demonstrated that such calls are not local calls, but rather exchange access that is jurisdictionally interstate when the information service itself is interstate in nature, as is Internet service. Ameritech also explained why - wholly apart from the controlling legal principles implicated - subjecting such traffic to the reciprocal compensation provisions of the Act is at odds with sound public policy.

Not surprisingly, competitive local exchange carriers (CLECs) - which had established a "cash cow" in Internet-related reciprocal compensation payments - as well as some ISPs, who shared the fruits of that cash cow, attempt

to put forth a contrary view. As shown below, however, the arguments they offer are wholly lacking in merit both from a legal and policy standpoint. Indeed, while the CLECs rely on such nonsensical and self-contradictory notions as "local wireline traffic that is jurisdictionally interstate," their tortured legal interpretations belie what is a simple truth: it has always been the case that the jurisdictional boundaries of a communication are determined by its beginning and end points, and the end points of a call to an ISP have always been - not the ISP switch - but the database or information source to which the ISP provides access. That being the case, a call to an ISP, including an Internet service provider, is exchange access, not local traffic. Were it otherwise, the Commission would have no jurisdiction over such traffic.

In fact, if the Commission (wrongly) holds that ISP traffic is local, that would necessarily have to be the end of its analysis in this proceeding. Under the recent 8th Circuit ruling, the Commission would be without authority to regulate this traffic, and it would be without authority to decide the extent to which reciprocal compensation obligations should apply to this traffic.[1]

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[1] Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir. July 18, 1997). In that decision, the Court held that the FCC's authority under section 251 of the Act is limited to those areas in which Congress expressly called for FCC involvement: subsection 251(b)(2)(number portability); 251(c)(4)(B) (prevention of discriminatory conditions on resale); 251(d)(2) (unbundled network elements); 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). Id. at note 10. The Court also held that the Commission lacks authority to enforce Interconnection Agreements (although Ameritech's agreements do not provide for the payment of reciprocal compensation for ISP traffic in any event). Therefore, if the Commission decides - wrongly - that ISP traffic is local, the Commission will have ceded all authority over that traffic to the states. The Commission will have no authority to decide whether reciprocal compensation obligations should apply to that traffic, whether the reciprocal compensation rate should be the same as for other local traffic, or what that rate should be.

## II. BECAUSE ISP TRAFFIC IS INTERSTATE, IT IS NOT SUBJECT TO THE RECIPROCAL COMPENSATION PROVISIONS OF THE ACT

As noted, Ameritech's Comments explained in detail why traffic delivered to ISPs is generally jurisdictionally interstate. Significantly, many CLECs and ISPs, including ALTS itself, as well as AT&T, Sprint, the Joint Commenters, and CompuServe, agree. As the Joint Commenters observe:

> From the beginning the ESP 'exemption' has been premised on the assumption that the traffic sent between end users and ESPs is jurisdictionally interstate. If the traffic were not interstate, there would have been no need for an 'exemption' in the first place, because interstate access charges could not lawfully have been applied.[2]

Similarly, AT&T points out:

> ISP traffic is overwhelmingly and inseparably interstate in nature and is unlike local business traffic because, for the vast majority of traffic, it is switched by the ISP at its local POP to distant data centers or Internet sites located in other states (or other countries).[3]

Having conceded that ISP traffic is jurisdictionally interstate, these parties have effectively admitted that it is outside the scope of the reciprocal compensation provisions of the Act. As the Commission held in the Interconnection Order, the reciprocal compensation provisions apply only to

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[2] Joint Commenters Comments at 12.

[3] AT&T Comments at 2. See also Sprint Comments at 2; CompuServe Comments at 4 ("CompuServe believes that under well-established precedent the great preponderance of this information services traffic is jurisdictionally interstate as a matter of law[.]"

local traffic, which is defined as traffic that originates and terminates within a local area.[4] Since, as these parties agree, ISP traffic is jurisdictionally interstate, it cannot possibly be local. That is because section 2(b) of the Act specifically denies the FCC jurisdiction over wireline intrastate services.[5]

These parties nevertheless contend that the Commission should treat these calls as local traffic for reciprocal compensation purposes. Generally, they argue that, since the Commission treats ISPs as end users for access charge purposes, it should likewise treat them as end users for reciprocal compensation purposes.[6] According to the Joint Commenters: "[t]he fact that traffic between end users and the Internet is jurisdictionally interstate . . . no more precludes the availability of terminating compensation . . . than the fact requires the assessment of interstate access charges under Sections 201 and 202."[7]

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[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 1, 1034 (1996). As the Commission noted: "The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." Id. at 1033. This decision - that Congress intended that the reciprocal compensation provisions of section 251(b)(5) apply only to local traffic, and not to access traffic - is in no way called into question by Iowa Utilities Board v. FCC. Rather, it is a decision that fall squarely within the Commission's authority under section 251(g) to preserve the access charge regime. Indeed, wholly apart from section 251, the Commission clearly has jurisdiction to issue rules with respect to interstate access traffic. Thus, its conclusion that reciprocal compensation obligations do not apply to interstate access traffic was not beyond its authority.

[5] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986). Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [Commission] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate service." For wireline services, only corridor traffic is both interstate and local. No other local calls cross state boundaries.

[6] See, e.g., AT&T Comments at 3-4; Joint Commenters Comments at 12.

[7] See, e.g. Joint Commenters Comments at 12-13. The Joint Commenters also offer a more novel theory: they engage in an exercise of verbal gymnastics to hypothesize that, while the traffic received by ISPs is interstate, the calls are local. This distinction between traffic and calls

These arguments are riddled with flaws. Most significantly, they cannot be squared with the Communications Act. Because, as the Commission found in the Interconnection Order, the Act preserves the distinction between local traffic and access traffic and establishes a reciprocal compensation regime only for local traffic, the Commission is not free to extend the reciprocal compensation provisions to interstate access traffic. Congress has spoken, and the Commission may not rewrite the law by "treating" what is in reality interstate traffic as local. Under the law, only traffic that is local is subject to section 251(b)(5). In this respect, the claim by the Joint Commenters that subjecting ISP traffic to reciprocal compensation is no different from exempting it from access charges is wrong. The Communications Act does not require the assessment of Part 69 access charges; thus the FCC is free to apply or not apply these charges as it deems appropriate in the public interest. It does, however, specify which types of traffic shall be subject to reciprocal compensation and which shall not, and the Commission is not free to deviate from that mandate.

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is completely fictitious, at least in the wireline world. It is also pointless, since the Commission has ruled that reciprocal compensation applies to local traffic, not local calls. Indeed, in recognition of this fact, the Joint Commenters ask the Commission "clarify that "local calls often carry interstate traffic [and] [w]hen that occurs, the 'interstate' traffic is also 'local traffic.'" Joint Commenters Comments at 21. Semantic games aside, there is nothing to this claim: apart from corridor traffic, there is no such thing as local calls that are jurisdictionally interstate.

## III. TRAFFIC DELIVERED TO ISPS AND INTERNET SERVICE PROVIDERS IS ACCESS TRAFFIC, NOT LOCAL TRAFFIC.

While, as noted, several commenters concede that ISP traffic is jurisdictionally interstate, others scrupulously avoid specific jurisdictional discussions. They simply claim that ISP traffic is local without explaining how the Commission could have "exempted" ISP traffic from the access charge regime if that traffic was beyond the jurisdiction of the FCC in the first place. Although this flaw alone is fatal to their analysis, it is also evident that ISP traffic is not, in any event, local, as they claim.

Carriers maintaining that ISP traffic is local offer five arguments to support this claim. These are: (1) the Commission has held that the traffic is local; (2) LECs have treated it as such; (3) the technical characteristics of the call make it local; (4) public policy requires that the Commission treat this traffic as local; and (5) it would be unreasonably discriminatory not to apply reciprocal compensation to such traffic. None of them has any merit.

### A. The Commission Has Never Held that ISP traffic is local

Most CLECs and ISPs that filed comments echo ALTS' claim that, through the enhanced service provider (ESP) access charge exemption, the Commission has deemed ISP traffic to be local traffic. In its Comments (at pp. 5-8), Ameritech addressed this claim in detail. Quoting extensively from the Commission's decisions regarding the treatment of ISP traffic, Ameritech showed that, while

the Commission has exempted ISPs from the access charge regime, the Commission has never held that ISP traffic is, in fact, local traffic. Rather, the Commission has always described this traffic as access traffic.[8]

To be sure, this is access traffic to which local rates currently apply. That is because in exempting ISPs from the existing access charge regime, the Commission deemed that they be treated as "end users" for purposes of that regime. This decision, however, does not change the jurisdictional nature of the call. It could not do so.[9] It is nothing more than a pricing decision by the Commission - a decision that, unless and until the Commission holds otherwise, ISP access should be priced at rates prescribed by state commissions for local business lines. This FCC pricing decision no more turns ISP access into local service than do the decisions of state regulators to mirror federal access charges turn intrastate access into interstate access.

According to some CLECs, the Universal Service Order, the Access Reform Order, and the Non-Accounting Safeguards Order all evidence the Commission's understanding that calls to ISPs are local calls. These claims misread each of those orders.

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[8] Even Commission statements cited by CLECs to support their claim that the Commission considers this traffic to be local prove the exact opposite. See, e.g., Teleport Comments at 2, quoting Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 at n. 8 (1988): "[T]herefore, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections" (emphasis added).

[9] The jurisdictional nature of a call - as defined by its end points - determines whether state or federal authorities have pricing authority, not vice versa. The fact that the FCC has deferred to the states in this arena does not mean that the FCC lacks jurisdiction; only that the

In the Universal Service Order, the Commission stated: "When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering."[10] According to some CLECs, this statement manifests the Commission's recognition that the call to the ISP is a separate call from any Internet transmission that follows and, accordingly, stands on its own as a local call.

This argument misconceives the Commission's decision. The fact that Internet service may not be a telecommunications service is relevant to whether Internet service providers must contribute to the Universal Service Fund. It is not, however, relevant to the *jurisdictional* classification of traffic received by Internet service providers. Indeed, there are many types of calls that involve discrete components that are treated differently under the universal service rules. A typical long-distance call, for example, consists of three separate services: originating access, terminating access, and the long-distance transmission service Only the latter (the retail service) is subject to universal service support obligations; the access services are wholesale services that are exempt. Yet the distinction drawn between these services does not signify that the access components constitute a jurisdictionally separate call. On the

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FCC has exercised that jurisdiction by designating state-established rates as the operative federal rates.

contrary, since both the access service and the interexchange service are utilized in transmitting the communication from its point of origin to its point of termination, they are jurisdictionally linked. Similarly, with Internet traffic, it is the beginning and end point of the communication, not the application of universal service rules to the components of the transmission, that dictate its jurisdictional status.

Nor is the fact that an Internet transmission may or may not be a telecommunications service relevant to the jurisdictional status of the connection to the Internet service provider. For one thing, some Internet transmissions clearly are telecommunications and the Commission has issued a Notice of Inquiry to explore, inter alia, the appropriate classification of Internet traffic.[11] That aside, however, the FCC has jurisdiction over interstate and foreign communications, not interstate and foreign telecommunications.[12] There can be no doubt that Internet transmissions constitute interstate or foreign

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[10] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, released May 8, 1997, at para. 789.

[11] See Ameritech Comments at 13-14. See also Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, CC Docket No. 96-263, FCC 96-488, released December 24, 1996 at para. 316. The FCC has recognized that "[t]he classification of information services, and especially Internet-based services, raises many complicated and overlapping issues[.]" Universal Service Order at para. 790.

[12] Section 1 of the Communications Act states: "The provisions of this act shall apply to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . . " 47 USC Section 151.

communications, over which the FCC has jurisdiction under Title I of the Act.[13] The jurisdictional boundaries of these communications are measured with reference to their beginning and end points, just like any other communication.

Some parties also cite a footnote in the Access Reform Order to support their theory that the Commission views ISP traffic as local traffic.[14] That footnote states: "To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.[15] This note in no way signifies that ISP traffic is local traffic; rather it simply reflects the fact that, for purposes of the ESP access charge exemption, ISPs are treated as end users. It reflects today's reality, wherein local business rates are a surrogate for access charges. Indeed, the reference to "points of presence" underscores the similarity between interexchange carriers and ISPs.

Finally, a few CLECs point to paragraph 120 of the Non-Accounting Safeguards Order as further "evidence" of the Commission's belief that ISP traffic is local. In paragraph 120, the Commission defined the meaning of "interLATA information services" for purposes of section 271 of the 1996 Act. The Commission held that an information service is interLATA if it incorporates

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[13] See OPP Working Paper Series #29, Digital Tornado: The Internet and Telecommunications Policy, Kevin Werbach, March 1997 (Digital Tornado) at 29; Ameritech Comments at 10-14.

[14] See, e.g. AOL Comments at 9; WorldCom/MFS Comments at 9.

[15] Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, and 95-72, FCC 97-158, released May 16, 1997, at note 502.

a bundled interLATA transmission component. According to RCN Telecom Services, since use of "an information service in coordination with interexchange telecommunications service does not transform that information service into an interexchange offering . . . the converse also should be true: the purely local call placed to an ISP does not become an interLATA telecommunications service merely because the ISP offers interLATA information services."[16] This reasoning is hopelessly confused. Ameritech does not claim that traffic routed to ISPs is interLATA or interexchange; Ameritech claims that it is access traffic, and nothing in the Non-Accounting Safeguards Order is to the contrary. Rather, the Commission's decision that interLATA information services contain two severable components - the delivery of the call to the ISP and the information service thereafter provided - simply recognizes what is true of any long-distance call: that there are two pieces involved: the access component and the interexchange transmission and that only the latter is potentially interLATA.

B. Ameritech Has Never Considered ISP Traffic to be Local

A number of CLECs also argue that incumbent LECs ((ILECs) have themselves demonstrated that ISP traffic is local traffic by treating it as such or describing it as such. They point out, for example, that ISPs purchase their services from intrastate tariffs and that LECs have not treated ISP traffic as jurisdictionally interstate for separations purposes.

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[16] RCN Telecom Services Comments at 6. See also WorldCom/MFS Comments at 9.

Ameritech would agree that there is an issue as to whether LECs should have filed federal tariffs mirroring their local exchange tariffs and reported certain business line revenues as interstate. The fact that LECs did not do so, however, in no way alters the fact that ISP traffic is access traffic not local traffic; it merely evidences the confusion engendered by the Commission's novel approach to ESP access charges, in particular, its holding that ESPs should be able to purchase access service at tariffed local rates.

A number of parties also point to a statement by Bell Atlantic in its Comparably Efficient Interconnection (CEI) plan for Internet access service in which it states that it will "subscribe only to generally-available local telecommunications service."[17] This statement, though, is nothing more than a restatement of the ESP access charge exemption, pursuant to which ISPs are end users for access charge purposes. It says nothing as to whether the traffic is truly jurisdictionally local.[18] In any event, as much as Bell Atlantic undoubtedly would like to dictate the law of the land, it is the true jurisdictional nature of the traffic, not some out-of-context characterization by Bell Atlantic, that is decisive here.

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[17] See AOL Comments at 9; Teleport Comments at 7-8; Dobson Communications Corp. Comments at 6.

[18] In any event, in other places in its CEI plan, Bell Atlantic characterizes the connection to its Internet access service as switched or special access. See Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, 11 FCC Rcd 6919, 6922-23 (1996).

Finally, Brooks Fiber charges that "[d]uring negotiations with ILECs, Brooks was repeatedly assured that ISP traffic would be treated according to the FCC's then-pending order on local competition."[19] Ameritech does not know which ILECs Brooks is referring to, or the significance of a statement that ISP traffic would be treated in accordance with an order that in no way addresses such traffic. Ameritech can, however, say without qualification, that it never represented to Brooks Fiber or any other CLEC that it would pay reciprocal compensation for traffic delivered to an ISP or that it considered such traffic to be local traffic for reciprocal compensation purposes.

C. From a Technical Standpoint, Calls to ISPs are not Inherently Local.

A number of CLECs point to various characteristics of ISP traffic in a vein effort to shore up their claim that such traffic is local. They note that LECs use local interconnection trunks and signaling associated with local calls to deliver traffic to ISPs, and that ISPs return answer supervision when they receive a call. A few note that calls to ISPs are circuit-switched, whereas Internet traffic is packet-switched. WorldCom/MFS contends that Internet service providers never relinquish control over Internet traffic, but, rather, hold the call while retrieving and sending information on behalf of the end user. It analogizes an Internet service provider to a travel agent which "may use any variety of communication services from any number of carriers to produce and provide its

[19] Brooks Fiber Comments at 2.

product to its customers."[20] KMC Telecom, in contrast, claims that a call to an ISP is like the first leg of a conference call. While these arguments are quite different - and, in some cases even contradictory - none demonstrates that ISP traffic is actually local traffic.

First, WorldCom/MFS' argument that an Internet user never actually accesses the Internet is just plain wrong. When an end user accesses remote databases, sends e-mail, participates in "chat rooms", sends and receives facsimiles, or communicates by voice over the Internet, the user is transmitting messages that may be carried to various sites around the nation and, indeed, around the world. Ameritech supposes that one could engage in semantic games and claim that it is not the user that is transmitting these messages but the Internet service provider that carries them, but that game could be applied to any communication made over any network. It obviously proves nothing.

WorldCom/MFS' claim that Internet calls do not actually reach the Internet is also belied by the Commission's characterization of such calls. For example, in the Non-Accounting Safeguards Order, the Commission described Internet service as follows:

> The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol . . . to enable information exchange. An end-user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in

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[20] WorldCom/MFS Comments at 7.

> turn, connects the end-user to an Internet backbone provider that carries traffic to and from other Internet host sites.[21]

According to WorldCom/MFS, the fact that ISPs reformat information received from users via circuit-switched connections into packets demonstrates that calls to the ISP terminate at the ISP location. This is fallacious. There are many contexts in which information is reformatted while it is transmitted from one user to another. Asynchronous Transfer Mode (ATM) technology, for example, uses the same conversion from circuit-switching to packet switching as is involved in an Internet call. It has never been suggested that this conversion marks the beginning of a jurisdictionally separate communication. More commonly, digital switches reformat analog communications into bits that are transmitted over the network and then converted back to the analog format. To argue that this conversion process has jurisdictional significance is to ignore the basic characteristics of today's networks.

Some CLECs point to other technical characteristics of ISP traffic to argue that this is local traffic. For example, Teleport points out that ILECs deliver ISP traffic to CLECs over local interconnection trunk groups and using signaling associated with local calls. Similarly, USX and Focal Communications note that ISPs send Answer Supervision when they receive a call.[22] Neither of these

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[21] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd 21905 at note 291 (citations omitted). See also Digital Tornado at 12, 18, and 45 (describing how *end users* send office information over the Internet).

[22] USX Comments at 3; Focal Communications Comments at 7.

observations has any jurisdictional significance. First, ILECs deliver ISP traffic over local interconnection trunks for the simple reason that callers use local telephone numbers to access ISPs and ILECs cannot distinguish between ISP traffic and local traffic on a real-time basis. ISP traffic, however, is not unique in this regard. ILECs also transmit Feature Group-A access traffic over local interconnection trunks and use signaling associated with local calls. In addition, ILECs use local interconnection trunks when they terminate interstate calls, using remote call forwarding interim number portability arrangements, to customers that have ported their telephone number to a CLEC. Obviously, the fact that local interconnection trunks are used in these instances does not render the traffic that is carried "local traffic."

Similarly, the transmission of Answer Supervision does not necessarily signify completion of a local call. If it did, Foreign Exchange (FX) calls and Off Net Access Lines (ONAL) traffic would be local traffic, as would long-distance calls made using Telecommunications Relay Service. In both of those situations, Answer Supervision is transmitted at an intermediate site, but in neither case does that signify the termination of the communication.

Lastly, KMC Telecom analogizes ISP traffic to the first leg of a conference call.[23] This analogy, however, is inapt, because a conference call is not at all similar to Internet communications. Conference calls are three-way calls; the "middle-man" is itself a participant in the call. Internet and other ISP traffic, in

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[23] KMC Telecom Comments at 6.

contrast, is two-way. In any event, the regulatory treatment of conference calls hardly presents a sound basis for establishing Internet policy.[24]

### D. Public Policy Dictates that ISP Traffic be Deemed Interstate, not Local.

A number of CLECs and ISPs argue that public policy considerations require that the Commission consider ISP traffic to be local. Ameritech notes, initially, that public policy considerations are irrelevant here, since the 1996 Act establishes which types of traffic are subject to section 251(b)(5), and the Commission is not free to deviate from that mandate. In any event these parties have it backwards: declaring ISP traffic to be local would be fundamentally at odds with sound public policy.

According to some CLECs and ISPs, classification of ISP traffic as anything but local would effectively deny CLECs the opportunity to compete for ISP business. They claim that CLECs would be forced to incur the costs of terminating traffic to ISPs without receiving any compensation for doing so.[25] They claim, further, that, without the funds from such reciprocal compensation payments, they would have less money available for network investments and

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[24] See Digital Tornado at 1: "[T]he Internet is fundamentally different from other communications technologies. In most cases, simply mapping the rules that apply to other services onto the Internet will produce outcomes that are confusing, perverse, or worse."

[25] See, e.g., Joint Commenters Comments at 8.

less incentive to pursue opportunities in the local loop.[26] They claim that the ILEC "attack on the reciprocal compensation framework for ISP traffic is designed to raise the costs to CLECs of offering services to ISPs and stem the migration of ISP traffic off the ILEC's network."[27]

These arguments are fundamentally misconceived. They are also disingenuous. The availability of reciprocal compensation for ISP traffic would not create a level playing field for such traffic; it would distort the playing field for that traffic. As explained in Ameritech's Comments, while theoretically reciprocal compensation payments merely compensate CLECs for the additional costs they incur in terminating local traffic, the reality is much different. The reality is that CLECs obtain much more than their additional costs, because CLECs may avail themselves of Most Favored Nations clauses to obtain a higher rate than they negotiated or were awarded.[28] Were this not the case, CLECs would not be rushing to sign up Internet service providers in droves, nor would Brooks Fiber be arguing that the $3 million in reciprocal compensation payments that it projects just for 1997 and just for Grand Rapids could provide it with a source of funds to invest in its network.

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[26] Brooks Fiber Comments at 4.

[27] AOL Comments at 15.

[28] The fact that the 8th Circuit has invalidated the FCC's "pick and choose" rule may make it a little less easy for CLECs to exercise their MFN rights, but those rights still exist. CLECs may still avail themselves of all the terms contained in any Interconnection Agreement that an ILEC has entered into with any party.

Moreover, when it comes to ISP traffic, the subsidies embedded in these high reciprocal compensation rates would flow in only one direction: from ILECs to CLECs. That is because Internet service providers do not generally make calls, but they generate huge volumes of inbound calls that are much longer in duration than typical calls. Some commenters maintain that Internet service providers are not unique in this regard, comparing them to pizza parlors, taxicab dispatchers, airline reservation services, catalog merchants, and credit card validation services.[29] These comparisons are inapt. Users do not spend four hours every evening "surfing" the wealth of information available from their taxicab dispatcher or chatting with their local pizza delivery service. Airlines, credit card companies, and catalog merchants do not typically rely on local service for their inbound traffic: they use 800 and other interstate services.

In contrast to CLECs, which would make money - lots of it - when they signed up ISPs as customers, ILECs would lose money when CLECs won ISP business. It is not just the fixed local service rate that the ILECs would lose - that is a pittance, and it is revenue to which the CLEC ought to be entitled if it can win the business of the ISP. Rather, it is the usage-based reciprocal compensation that the ILEC would have to pay that is problematic. In the Ameritech region, that compensation can be as high as 1.5 cents per minute and it now comprises up to 70% of the total reciprocal compensation payments that

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[29] AOL Comments at 12; Cox Communications Comments at 10; Joint Commenters Comments at 8.

Ameritech made to some CLECs before identifying and terminating reciprocal compensation payments on ISP traffic.

True, the Commission concluded in the Access Reform Order that ILECs had not proven that that "the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs."[30] The Commission did not, however, consider the impact of Internet traffic if ILECs had to pay up to 1.5 cents per minute for every Internet call.[31]

All of this might be somewhat less problematic if ILECs would have an equal opportunity to compete for ISP traffic and thereby take advantage of the reciprocal compensation windfall available from Internet traffic, but they would not. Since, at least for the short-term, most users originating ISP traffic will be ILEC customers, for most calls, ILECs would be ineligible for any reciprocal compensation. Even when reciprocal compensation was available, however, the CLEC would be in a position, pursuant to its MFN rights, to dictate the applicable reciprocal compensation rate.

The truth of the matter is that the best way to achieve equity in this area is to subject ISPs to some form of usage-based access charge, the revenues from which would be divided between ILECs and CLECs to the extent that both were involved in provisioning the access traffic. Until that happens, however, the

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[30] Access Reform Order at para. 346.

[31] Under the Commission's ESP access charge exemption, ILECs do not receive any usage-based revenue for Internet traffic. Ameritech sees no reason why CLECs ought not be treated similarly.

only way to create a level playing field for ISP traffic is to make clear that such traffic is interstate access traffic to which reciprocal compensation obligations do not apply. Then all LECs would compete for ISP business on the same terms - with neither receiving compensation for terminating traffic.[32]

The Joint Commenters make the additional argument that reciprocal compensation payments represent the savings from ILECs in not having to terminate local traffic. This is incorrect. About one third of Ameritech's local traffic originates and terminates off the same local switch. When Ameritech handles both the originating and terminating end of such traffic, it incurs no termination costs: no trunk circuit need be established and the local loop cost is fixed. If a CLEC serves the terminating customer, however, Ameritech must establish a trunk circuit to exit the originating switch and then transport the call over local interconnection trunks to the CLEC. Thus, Ameritech actually incurs additional costs on such calls - costs it would not incur if it completed the call itself. With respect to interoffice local traffic, Ameritech does avoid certain costs – specifically the cost of switching the terminating traffic. (Ameritech does not save interoffice transport costs because Ameritech must transport the traffic to

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[32] While Ameritech would concede that CLECs might not be incented to compete for ISP business without a reciprocal compensation subsidy, that result would hardly strike a blow to the development of local competition generally, since the number of ISPs is minuscule, as compared with the number of local telephone users. Of course, if the Commission adopts a more economically rational rate structure for ISPs - wherein ISPs pay cost-based usage charges for their access service, then CLECs and ILECs alike would be incented to compete for ISP traffic. Indeed, one of the ironies in this proceeding is that ISPs - which lobbied long and hard for their access charge exemption - now complain that, unless CLECs are subsidized with reciprocal compensation payments - CLECs might not want to serve them.

the CLEC instead of to Ameritech's own terminating switch. ) It is not clear whether the additional costs incurred for calls that would have been intra-switch outweigh the savings from inter-switch calls. Since the costs of short-haul transport are considerable, it may well be that they do. What is clear, however, is that reciprocal compensation payments are grossly in excess of any net savings to Ameritech, assuming that there are any savings at all. Thus, the Joint Commenters suggestion that ILECs might earn a windfall if they do not have to pay reciprocal compensation on ISP traffic is based on a false premise.

Equally specious is the suggestion of the Joint Commenters that ILECs are spared traffic congestion problems associated with Internet traffic when CLECs deliver traffic to ISPs. On the contrary, the Internet traffic does not disappear when the CLEC signs up an Internet service provider as customer; it is simply transferred from the switch that serves the ISP to the switch serving the CLEC's local interconnection facilities. Indeed, that transfer actually exacerbates network congestion problems. That is because, without the transfer, about 1/3 of the calls to the ISP would have been intra-switch and not routed over interoffice facilities, whereas, when the CLEC serves the Internet provider, nearly all Internet traffic must be routed over ILEC interoffice facilities. The fact that CLEC interconnection facilities are most often served by tandem switches only further exacerbates the ILEC's network congestion problems.

In contrast to these flawed arguments, Ameritech's Comments explained why declaring ISP traffic to be local would be contrary to the public interest.

Ameritech noted that such a decision would cede jurisdiction over ISP traffic to the states, and thereby preclude the Commission from incorporating its treatment of that traffic into a coherent, national Internet policy. Ameritech noted, further, that such a decision would prevent the Commission from ultimately replacing the current fixed rates that apply to ISP traffic with a more, economically rational usage-based charge, albeit one that might be different from today's Part 69 charges. It also explained how the current, non-economic pricing of ISP access, coupled with reciprocal compensation subsidies, distorts the market for Internet-based services. These are the public policy considerations that are implicated by this proceeding - not the desire of CLECs to construct a cash cow out of statutory requirements that were intended only to establish a level playing field.

E. Charges of Discrimination are Bogus

A few commenters, echoing ALTS's letter, assert that it would be unreasonably discriminatory for ILECs not to pay reciprocal compensation on ISP traffic. These assertions are frivolous. First, because ISP traffic is not local traffic, ILECs have no obligation to pay reciprocal compensation for that traffic. Second, if ILECs did have such an obligation, their refusal to pay would be a violation of that obligation, but it would not constitute discrimination. Since Ameritech does not knowingly pay reciprocal compensation to any LEC for ISP traffic, Ameritech treats all LECs alike. Thus, any claim of discrimination would